Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

GARY DAVIS,

Petitioner,

v.

GEORGIA NUNEZ,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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83 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Ninth Circuit erred in holding that Respondent's insubordinate and disruptive behavior in the work place should be provided First Amendment protections?

2. Whether it is reversible error for a judge to charge the jury to decide matters of law which are uniquely within the Court's province?

3. Whether Judge Gary Davis was entitled to the protections of qualified immunity for firing an at-will employee based on the advice and guidance he received from legal counsel?

4. Whether Judge Gary Davis was entitled to the protections of qualified immunity inasmuch as his actions in terminating Respondent did not run afoul of clearly established law at the time the actions took place?

PARTIES TO THE PROCEEDING

The plaintiff, below, was Respondent Georgia Nunez. The defendant was former-judge Gary Davis. Throughout this Petition, Ms. Nunez will be identified as "NUNEZ." The Respondent, Gary Davis, will be identified as "JUDGE DAVIS" due to the fact he was a judge at the time these events took place.

The City of North Las Vegas, a former Defendant, was dismissed before trial. Other than these parties, no other parties to the proceeding, parent companies, or non-wholly owned subsidiaries are known or identified.

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CITATIONS TO OFFICIAL AND UNOFFICIAL REPORTS

The only published Order received in this litigation is that of the Ninth Circuit. The opinion from which JUDGE DAVIS seeks relief is found at *Nunez v. Davis*, 169 F.3d 1222 (9th Cir. 1998). No other published or unofficial reports could be located.

JURISDICTION

On September 4, 1997, JUDGE DAVIS filed a Motion for Summary Judgment with the Court in anticipation of the then-pending trial. Raised in the Motion for Summary Judgment was, among other issues, the doctrine of Qualified Immunity and its application to JUDGE DAVIS based on the admissions of NUNEZ to that point in the litigation. Rather than decide on this issue, the Judge proceeded forward to trial and indicated he would consider the matter as a Motion for Directed Verdict or Judgment Notwithstanding the Verdict.

At the close of the trial, the jury rendered a verdict against JUDGE DAVIS – after having been forced to come to legal conclusions without guidance from the district court.

Thereafter, the Motion for Summary Judgment was brought again as a Directed Verdict pursuant to F.R.C.P. 58 – as the district court had requested. On September 23, 1997, the court denied that Motion, and specifically stated he did not believe qualified immunity applied in this case. That decision, along with the jury verdict and the Judge's prior decisions regarding qualified immunity were appealed on October 9, 1997.

After considering the briefs and hearing oral argument on the matter, the Ninth Circuit issued its opinion – sustaining the trial verdict and the actions of the district court. *See Nunez v. Davis*, 169 F.3d 1222 (9th Cir. 1998). The opinion, however, addressed – incorrectly – the relevant issues of law which form the basis for the instant Petition. That Order was issued on March 12, 1999. Thereafter, a timely Petition for Rehearing was filed. The denial of the Petition for Rehearing and Suggestion for Rehearing En Banc was rejected on May 12, 1999.

Based on this final Order from the Ninth Circuit, Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1). Likewise, jurisdiction is found pursuant to Supreme Court Rules 13(1) and (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

JUDGE DAVIS respectfully submits that his actions do not run afoul of the Constitution or any federal statute and, therefore, specific presentation of a particular ordinance or statute may be inappropriate at this point. However, from Respondent's standpoint, at issue is the First Amendment to the United States Constitution and 42 U.S.C. § 1983. Specifically, that Amendment states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or bridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

On December 16, 1993, NUNEZ originally filed her Complaint with the United States District Court for the District of Nevada. The Complaint was amended on June 6, 1994. The Amended Complaint asserted then-Judge GARY DAVIS, in his official and individual capacity, along with the City of North Las Vegas, was involved in her wrongful termination. Essentially, she claimed her termination on October 7, 1993, was in violation of her First Amendment constitutional right to speak out on behalf of other employees.

Upon receipt of the Complaint, Motions to Dismiss were filed. The district court held the City of North Las Vegas should be dismissed entirely from the litigation. However, he required JUDGE DAVIS to stay.

On May 3, 1996, a Motion for Summary Judgment regarding qualified immunity was filed on behalf of JUDGE DAVIS. On January 30, 1997, the Court denied that Motion.[1] Accordingly, the parties prepared themselves for trial.

Pursuant to an Order on August 25, 1997, the Court moved up the scheduled trial date thirty (30) days to September 8, 1997. JUDGE DAVIS then filed an Emergency Motion for Summary Judgment on September 4, 1997. Again, the Motion argued NUNEZ had failed to establish a First Amendment violation; it also re-raised

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[1] This Order is found in Petitioner's Appendix beginning at page 36.

the issue of qualified immunity. After briefing on the matter was completed, the district court initially declined to consider the Motion for Summary Judgment but allowed it to be treated as a Rule 50(a) Motion to be heard at the conclusion of the trial.

At the close of the trial, the parties argued over the instructions to be submitted to the jury. JUDGE DAVIS argued that issues were being submitted regarding the First Amendment which were properly questions of law for the Court. The Judge refused to give JUDGE DAVIS's requested instructions and stated "for the record" that qualified immunity would not be considered by him.[2] After having the matter submitted to them, the jury rendered a verdict in the amount of One Hundred Forty One Thousand, Four Hundred and Forty Six Dollars and 31/100 ($141,446.31) against JUDGE DAVIS.[3]

On September 15, 1997, the parties attended a telephonic hearing on this matter. At the conclusion of argument, the Court rejected the position that JUDGE DAVIS acted appropriately in terminating NUNEZ for her actions which, he believed, constituted political expression.[4]

That decision was entered on September 23, 1997.[5] Both that decision and the Judge's decisions on qualified immunity and the verdict itself were appealed on October

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[2] *See* Petitioner's Appendix at p. 32.

[3] *See* Petitioner's Appendix at p. 14.

[4] *See* Petitioner's Appendix at pp. 18-19.

[5] This Order is found in Petitioner's Appendix at p. 14.

9, 1997. The Ninth Circuit, in reviewing this matter, specifically held the First Amendment was an overriding authority on the ability of JUDGE DAVIS to terminate employees who were at-will. The Ninth Circuit further conceded submitting issues of law to the jury was blatantly in error. However, they believed it was harmless error. Furthermore, the Ninth Circuit erroneously agreed that qualified immunity did not apply to JUDGE DAVIS.[6]

The Ninth Circuit Order sustaining the jury verdict and the improper actions of the judge was entered and served on March 12, 1999. Upon receipt of the Order, a Petition for Rehearing and Suggestion for Rehearing En Banc was filed with the Ninth Circuit Court of Appeals on April 1, 1999. On May 12, 1999, the Ninth Circuit rejected, in its Order, having the matter subjected to a hearing en banc.[7]

The problem with the Ninth Circuit Order, as indicated, is that it countenances the submission of plainly wrongful jury instructions, mischaracterizes acts of insubordination and disruption as protected speech, and refuses to recognize the hallowed doctrine of qualified immunity and its obvious application to the present case.

B. STATEMENT OF THE FACTS

NUNEZ was employed in the Municipal Court system for the City of North Las Vegas from March 22, 1972 until October 7, 1993. From March 1, 1988 until her termination, she served as the Court Administrator for the City

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[6] *See* Petitioner's Appendix at p. 1.

[7] *See* Petitioner's Appendix at p. 17.

of North Las Vegas Municipal Court System – being appointed by JUDGE DAVIS to that calling. She was aware, upon taking that position, that she gave up her contractual rights and became an at-will employee. She knew when she was faced with a disagreement between her position and that of the Judge, her obligation was to follow the Judge's orders. She also knew her position was premised upon (and beholden to) mutual trust, confidence and loyalty.

Approximately once or twice a year, seminars would be held with the Nevada Supreme Court and often (but not always) JUDGE DAVIS would send clerks to the seminars. In addition there was an internal training program given by more senior clerks to new hires. Other than this, the clerks did not go on any other seminars. This prohibition came directly from the Judge.[8]

In 1993, JUDGE DAVIS was up for re-election. The campaign was rather heated and the Judge became stressed. In the midst of that campaign, NUNEZ had a conversation with JUDGE DAVIS regarding the lack of support he was receiving from his staff in the course of his campaign. The Judge admitted that, in the heat of the campaign, he was stressed and indicated that if individuals did not help him on his campaign, he would not authorize them to attend any seminars. NUNEZ allegedly informed JUDGE DAVIS that if he refused to allow clerks to attend the seminars he could be in a lot of trouble.

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[8] Attending schools was not a right or privilege of employment within the Court system. In fact, even prior to the June of 1993 campaign, JUDGE DAVIS had a host of reasons why clerks could not attend these seminars.

As indicated, the relationship between JUDGE DAVIS and NUNEZ was one of trust, loyalty and confidence. However, the admitted actions of NUNEZ for a period of time leading up to her termination eroded that trust and confidence. Independent witnesses at trial stated that although the relationship between JUDGE DAVIS and NUNEZ seemed to be pleasant, there were admittedly periods of time when they were in a serious state of conflict. NUNEZ displayed acts of pettiness, an unwillingness to follow through with JUDGE DAVIS's commands, and an unwillingness to assist him in obtaining improvements for the Court system which JUDGE DAVIS believed were necessary.

One of his major concerns was with his perceived backlog in the court system. In fact, JUDGE DAVIS specifically told NUNEZ that no one was to go out of the office for any extended leave until the backlog had been handled. This statement by JUDGE DAVIS, made several weeks after his heated comments about needing additional assistance, was the subject of quiet disagreement by NUNEZ herself. She did not perceive there was a backlog. However, she admitted she believed JUDGE DAVIS would not authorize taking herself and two clerks in the office to an upcoming seminar. Even though she knew JUDGE DAVIS was the final approving authority and believed that he did not want anyone to attend based on his concern over the backlog, NUNEZ chose to circumvent the Judge's authority by simply taking the clerks to the seminar without ever notifying JUDGE DAVIS or obtaining his permission or approval.

NUNEZ claimed she engaged in this subterfuge and insubordination to protect the First Amendment rights of clerks within the office to not assist JUDGE DAVIS in his

campaign. However, the testimony adduced at trial stated unequivocally that JUDGE DAVIS, when the seminar was discussed, did not distinguish between those who had assisted in his campaign and those who had not. Rather, he indicated his concern was with a backlog and having people taken out of the office.

Despite NUNEZ' strong feelings about the constitutional rights of the clerks under her supervision, she admitted that she never told *anyone* in a supervisory or authoritative capacity within the City of North Las Vegas about what she believed to be JUDGE DAVIS's improprieties or of the unconstitutional position which she was allegedly taking. She never told the City Attorney, the Mayor, the City Manager; never went to the press about this issue. In fact, she knew these employees were protected by a Union and admittedly never went to the Union about her concerns. In short, NUNEZ did not make a public statement about her perception of JUDGE DAVIS's decision at all.

NUNEZ also tried to justify her behavior by claiming it was her unilateral belief that taking herself and two clerks from the Court during this period of time would not leave it in a bind.

The testimony at trial indicated, without rebuttal, that when JUDGE DAVIS learned of NUNEZ's absence, upon making inquiry as to where she had gone, he was informed by several workers that NUNEZ had aggressively acted to cover up her location and encouraged other trusted members of JUDGE DAVIS's staff to engage in lies and deception on this issue.

When NUNEZ returned, several days later, she had an interaction with JUDGE DAVIS. He told her that he

was very disappointed in her and he felt that she had failed him. He then listed a number of concerns which he had regarding her failure to support and sustain him. Not once did he list taking female clerks to a seminar when they had not assisted him in his 1993 campaign.[9]

Ultimately, NUNEZ asked if his concerns were about her taking these clerks to the seminar without his approval. He told her his concerns went "way beyond that."

After this meeting, NUNEZ's relationship with JUDGE DAVIS became quite strained. This, however, was the logical result – as NUNEZ herself admitted – of the effect her behavior would have on the relationship. NUNEZ knew the disrupted relationship between herself and JUDGE DAVIS carried over to have an adverse affect between JUDGE DAVIS and the court clerks.

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[9] The testimony at trial was also consistent – from the women who attended the seminars themselves – that they had never assisted the Judge on his campaign. However, throughout their employment with the City of North Las Vegas, and even after this event, they received merit raises which had to be approved and submitted by JUDGE DAVIS himself and were allowed to attend as many seminars as any other court clerk. In fact, the testimony of NUNEZ was that she was aware that JUDGE DAVIS would make similar comments during each of his campaigns regarding a need for support from the clerks. Repeatedly the Judge would threaten not to allow people to attend seminars or withhold "benefits" if assistance was not provided. However, the consistent testimony given by NUNEZ and others was that people would still not help on the campaigns. Nevertheless, no one testified that they were ever denied attendance at a seminar or, more importantly, the receipt of merit raises based on their participation (or lack thereof) in the campaign.

Prior to October 7, 1993, JUDGE DAVIS spoke with the City Attorney regarding whether termination of NUNEZ was possible. In that communication, he outlined – in some detail – the areas where he felt his confidence in NUNEZ had become compromised. Again, he did not identify taking these clerks to a seminar in June of 1993 as one of the areas of concern. The City Attorney, listening to the concerns which were articulated, informed JUDGE DAVIS that these matters, alone, were sufficient to warrant her termination – particularly in light of her at-will status. He encouraged JUDGE DAVIS to simply terminate NUNEZ without any further discussion.

With this legal advice, on October 7, 1993, JUDGE DAVIS approached NUNEZ and told her she was terminated. She wanted to discuss the reasons why he was firing her, but he told her they had nothing to discuss and walked out of her office.

In her own mind, NUNEZ became convinced that she was terminated solely because she was a champion for the constitutional rights of her subordinate clerks. It was this issue that she brought to trial and the issue on which the jury ultimately found in her favor. As indicated, however, certain serious problems exist with this jury decision and are only amplified by the published decision of the Ninth Circuit addressing these matters. Accordingly, a Writ of Certiorari must issue to review these charges in detail and, upon review, to correct this injustice and reverse the decision of both the Ninth Circuit, the District Court and the jury itself.

LEGAL ARGUMENT SUPPORTING ISSUANCE OF A PETITION

Due to the abbreviated nature of a Petition for Writ of Certiorari, JUDGE DAVIS will not provide this Court the legal standards for review of these decisions. Rather, he will devote his time to simply identifying the glaring legal flaws which warrant the granting of a Petition for Writ.

I. NUNEZ' CONDUCT WAS NOT FIRST AMENDMENT SPEECH

To prevail on the claim the termination violated her First Amendment protections, NUNEZ has to prove her conduct was constitutionally protected and was a substantial or motivating factor in the termination. *Board of County Commissioners v. Umbehr*, 116 S. Ct. 2342 (1996). If she could discharge that burden, JUDGE DAVIS could escape liability by showing he would have taken the same action even in the absence of protected conduct. *Id.*

The threshold question to be answered is whether NUNEZ's act was "speech" and, if so, was it entitled to constitutional protection. *Voight v. Savell*, 70 F.3d 1552, 1559 (9th Cir. 1995). It is the Court that must decide this because "[t]he inquiry into the protected status of speech is one of law, not fact." *Connick v. Myers*, 461 U.S. 138, 148 n.7 (1983). Likewise, the questions involving whether the employee's interest outweigh the employer's are questions for the Court to decide. *Waters v. Churchill*, 511 U.S. 661, 668-69 (1994).

This Court has applied a balancing test whenever a public employee has asserted they have been the subject of retaliation for exercising their First Amendment rights. *Pickering v. Board of Educ.*, 391 U.S. 563 (1968). The test requires weighing the interests of the employee, as a citizen, in commenting on matters of public concern *against* the interest of the state, as an employer, in promoting the efficiency of the public service it performs through its employees. *Id.* at 568; *Connick*, 461 U.S. at 146. NUNEZ's insubordinate acts were not expressive First Amendment "speech", did not address matters of public concern, and were outweighed by the interest of the state.

One of the threshold issues in raising a retaliatory discharge because of an employee's exercise of First Amendment rights is whether the person was discharged for her speech. *Pruitt v. Cheney*, 963 F.2d 1160, 1163 (9th Cir. 1991) (upholding the discharge of an Army officer because she was discharged for her status as a homosexual not for the content of her speech claiming such in the newspaper); *Tindle v. Caudell*, 56 F.3d 966, 969-70 (8th Cir. 1995). Thus, if the conduct is not "speech" under the First Amendment, the claim is invalid.

To be certain, the First Amendment Free Speech Clause "is not confined to verbal expression" and "embrace[s] appropriate types of action." *Brown v. Louisiana*, 383 U.S. 133, 142 (1966). However, communicative conduct or symbolic speech is generally limited to conduct where the intended action *is* the message itself. Nonverbal conduct will only implicate the First Amendment where the person engaged in the conduct intends to convey a "particularized message" and if the likelihood was great that the message would be understood by those

who viewed it. *Texas v. Johnson*, 491 U.S. 397, 404 (1989); *Dunn v. Carroll*, 40 F.3d 287, 291 (8th Cir. 1994). This rejects "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *United States v. O'Brien*, 391 U.S. 367 (1968).[10]

Fortunately, courts generally distinguish between protected speech and unprotected insubordinate conduct. For instance, in *Domiano v. Village of River Grove*, 904 F.2d 1142 (7th Cir. 1990), the Court held a fire chief's disagreement with a patient transportation ordinance was protected speech; however, "his adamant refusal to follow the ordinance was insubordination justifying dismissal." *Id.* at 1146. In other words, the Court distinguished between protected speech and unprotected, insubordinate conduct. "The First Amendment is . . . not a license for insubordinate speech that impedes an employee's performance of his duties or that interferes with the proper functioning of the workplace." *Id.* at 1145.

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[10] In *Connick*, Justice Brennan observed:

> Perhaps the simplest example of a statement by a public employee that would not be protected by the First Amendment would be answering "No" to a request that the employee perform a lawful task within the scope of his duties. Although such a refusal is "speech," which implicates the First Amendment interests, it is also insubordination, and as such it may serve as the basis for a lawful dismissal.

461 U.S. at 163 n.3 (Brennan, J., dissenting).

Additionally, in *Eberhardt v. O'Malley*, 17 F.3d 1023 (7th Cir. 1994), Judge Posner, while holding the First Amendment protects a state attorney from being discharged for writing a novel about the criminal justice system, recognized the attorney would not be protected if the methods he employed for gathering the material were considered misconduct. *Id.* at 1027. "If someone wanting to write a murder mystery decided he really ought to find out what it feels like to be a murderer and so he went out and killed someone, his punishment for murder would not raise any issue under the First Amendment." *Id.* Accordingly, although a person's conduct may have free speech implications, misconduct or insubordination it will not be protected.

The Ninth Circuit has also distinguished between protected speech and unprotected conduct such as insubordination. *Kotwica v. City of Tucson*, 801 F.2d 1182 (9th Cir. 1986), held the Constitution does not prevent the government from disciplining an employee when he or she makes a statement to the media inconsistent with the employer's directions. *Id.* at 1184-85. Refusing to obey orders is simply unprotected conduct. *Allen v. Scribner*, 812 F.2d 426, 435 (9th Cir. 1987); *see Weisbuch v. County of Los Angeles*, 119 F.3d 778 (9th Cir. 1997). Accordingly, NUNEZ cannot find shelter for her insubordinate conduct merely because she *thought* JUDGE DAVIS's decision to not allow the two clerks to attend the seminar was premised upon not supporting his campaign.

Conduct cannot be protected unless "it substantially involved matters of public concern." *Johnson v. Multnomah County, Oregon*, 48 F.3d 420, 422 (9th Cir. 1995) (citations omitted). Speech involves matters of public concern when it can fairly be considered to relate to "any matter of political, social, or other concern to the community. *Connick*, 461 U.S. at 146.

The "matter of public concern" test is an attempt to identify situations in which the employee's First Amendment protection of her speech is "so insubstantial that the employer need show no countervailing interest at all before the employer may repress it." *Johnson*, 48 F.3d at 423. The federal court is not the appropriate forum to review the "wisdom of a personnel decision" taken by the government in response to an employee's behavior. *Connick*, 461 U.S. at 146. In deciding whether an employee's speech addresses a matter of public concern, the court should consider "the content, form, and context of a given statement, as revealed by the whole record." *Id.* at 147-48.

> Content is the most important of these factors. Yet, as we have emphasized time and again, an inquiry must also take into account "the point of the speech in question: Was it the employee's point to bring wrong doing to light? Or to raise other issues of public concern because they are of public concern? Or was the point to further some purely, private interest?"

Smith v. Fruin, 28 F.3d 646 (7th Cir. 1994).

Even if the subject at issue involves a matter of public concern, if the expression addresses only the personal effect upon employees, then the conduct is not of public concern. *Holbrook v. City of Alpharetta*, 112 F.3d 1522, 1530

(11th Cir. 1997); *Marshall v. Porter County Plan Comm'n*, 32 F.3d 1215, 1219 (7th Cir. 1994).

The issue of whether the employee attempted to have the subject of her expression aired in a public forum is a relevant factor in the "matter of public concern test." *See Morgan v. Ford*, 6 F.3d 750, 754 (11th Cir. 1993); *Lawrenz v. James*, 852 F. Supp. 986, 991 (M.D. Fla. 1994). In this case, by her own admission, NUNEZ did not go public with this information at all.

Given these standards, the facts of this case indicate – as a matter of law – that NUNEZ did not engage in protected speech or symbolic speech when she violated JUDGE DAVIS's directions and sought subversion – if not outright controvention – of his authority within the court system. Her conduct, as a matter of law, stands as insubordinate behavior – not protected speech. The Ninth Circuit erred in determining that a First Amendment violation had taken place. Accordingly, a Petition for Writ must issue to erase this gross injustice.

II. IT WAS REVERSIBLE ERROR FOR THE JUDGE TO SUBMIT THESE ISSUES TO THE JURY

The wrongful confusion of the jury is understandable when the Court considers that the Judge, in an abdication of his responsibilities to hear the case properly, required the jurors to not only make decisions on issues of fact but also on issues of law. Indeed, the *Pickering* analysis which has been identified to this Court, was placed solely in the hands of the jury to decide at each and every level. This Court, in *Connick*, specifically held that determining whether the insubordinate conduct rose to the level of "speech" was a matter of law that had to be decided by

the court. 461 U.S. at 148 n.7. Here, as a matter of law, NUNEZ's conduct was not speech because she did not speak on matters of public concerns, she did not make those concerns public, and her expressions were acts of insubordination as opposed to expression of ideas. Accordingly, the First Amendment should never have been implemented.

The Ninth Circuit glossed this error over by saying they felt that the error was "harmless". However, their reasoning is circular in nature. They ignore the fact that this issue was raised to the Court in the Motion for Summary Judgment prior to any trial testimony and was rejected by the Court on inappropriate grounds. The Ninth Circuit further ignored these elements in determining whether, as a matter of law, NUNEZ's conduct was speech-related. Instead, they were content to determine that because, in NUNEZ's mind, she was allegedly engaging in acts of civil disobedience on issues of public concern, her conduct became speech.

Again, it is submitted this is a blatant error and a complete advocation of the responsibilities of the judiciary to perform the appropriate analysis in determining whether the lofty goals of the First Amendment may be brought to such low depths.

III. THE INSUBORDINATE NATURE OF NUNEZ'S BEHAVIOR WARRANTED HER DISMISSAL

An employee "has an absolute obligation to satisfactorily perform the duties and work inherent in his position. One of these duties is to conform to departmental regulations. . . . " *Jenson v. Olson*, 353 F.2d 825, 828 (8th Cir. 1965). While an employee has a right to say what is

on his or her mind, there is no right to public employment. *Id.*

> He may speak as he pleases and level charges at all suspects. But if the exercise of this privilege disrupts his own work and reduces the efficiency of the department he is subject to discharge for cause. . . . he may speak as he wishes but also must be responsible for his statements. When his speech is disruptive of the proper functioning of the public's business the privilege of governmental employment may be withdrawn without it being said that he was denied his freedom of speech. To hold otherwise would enable governmental employees to practice their rankest form of insubordination and safely hide behind the right to free speech.

Id. Assuming NUNEZ can meet the threshold burden of showing protected speech was implicated in her termination, the Court must then weigh the interest of the state, as an employer, in promoting efficiency of the public services it performs through its employees. *I.N.S. v. Federal Labor Relations Auth.*, 855 F.2d 1454, 1466 (9th Cir. 1988).

Because NUNEZ's insubordination raised serious issues about the efficiency of the services provided by the Municipal Court, she cannot prevail because these substantial state interests outweigh her own. JUDGE DAVIS had interests, as an employer, in promoting the efficiency of the judicial services performed through the employees. *Rankin v. McPherson*, 483 U.S. 378, 384 (1987). The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as a sovereign to a significant one when it acts as employer.

> The government cannot restrict the speech of the public at large just in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may very well be appropriate.

Waters, 511 U.S. at 675. Hence, termination because of protected speech-related reasons may be justified if the speech "severely damaged office harmony and working relationships. . . . ". *Hyland v. Wonder*, 972 F.2d 1129, 1139 (9th Cir. 1992).[11] "A government department cannot select a policy and carry it out unless the higher ranking people can be assured that their subordinates will carry it out." *Weisbuch*, 119 F.3d at 784.

The time, place and manner of the employee's speech is relevant to the determination of whether the agency's "institutional efficiency was threatened." *Connick*, 461 U.S. at 153. In addition, consideration must be given to the context of the dispute; whether the statement tends to impair discipline; whether it had a detrimental impact on a close working relationship for which personal loyalty and confidence are necessary; whether it impedes performance of the speaker's duties or with the regular operation of the workplace, and whether the speech was knowingly or recklessly false or motivated by personal issues. *Rankin*, 438 U.S. at 388; *see Hyland*, 83 F.3d at 1081. An action committed by a subordinate "in the face of a

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[11] This question, like whether the statement is a matter of public concern, is also a question of law for the court to decide. *Waters*, 511 U.S. at 668 (holding that it is the *court's* task to apply the balancing test to the facts); *Shands v. City of Kennett*, 993 F.2d 1337, 1342 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 880 (1994); *Dunn*, 40 F.3d at 291.

command that she act as staff and exercise no authority of her own is impermissible under all five factors." *Nelson v. Pima Community College*, 83 F.3d 1075, 1081 (9th Cir. 1996).

In this case, NUNEZ's insubordination impairs these five factors of agency disruption. *First*, she explicitly flouted an instruction given her by JUDGE DAVIS, her supervisor; thus, impairing discipline and control. Insubordination undermines office harmony and efficiency; "[t]he alternative would be a policy carried out inefficiently or not at all [causing] constant departmental strife. . . . " *Weisbuch*, 119 F.3d at 784. *Second*, she disrupted co-worker relationships by making others, such as JUDGE DAVIS's secretary, participate in her scheme and cover-up. In fact, it could be fairly reasoned from the established facts JUDGE DAVIS's concern over taking the women to the seminar – assuming such a concern – was more with NUNEZ's knowing and intentional breach of established protocol; including, her subsequent attempts to undermine JUDGE DAVIS's authority with those people who performed critical staff functions than in regard to the campaign issue.

Third, by her own admission, her act eroded the working relationship and confidence JUDGE DAVIS previously had in her. JUDGE DAVIS numbered this insubordinate and deceitful act (among several others) as a reason he had lost confidence in her to serve as Court Administrator. *Fourth*, the act interfered with NUNEZ's duties because she was responsible for the efficiency of the clerks and removing two of them, without authorization, for a three-day period countervened that responsibility. *Fifth*, and finally, her conduct also disrupted the routine operation of the office by fostering the court's back log and putting her agenda as Court Administrator

over JUDGE DAVIS's. She admitted taking these women to the seminar without informing JUDGE DAVIS was a violation of the established working relationship between the parties. Because it was an unauthorized change in office procedure, it, too, disrupted the routine operation of the office.

> [T]he Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency.

Connick, 461 U.S. at 151.

The *Pickering* balancing test "is not all-or-nothing but rather a sliding scale" under which the degree to which an employee's conduct involves speech and public concern is weighed against the degree of disruption to the government office. *Click v. Copeland*, 970 F.2d 106, 112 (5th Cir. 1992). A lesser showing of disruption will be sufficient if the employee's speech does not substantially involve First Amendment speech and matters of public concern. Employer's are not required to make a stronger showing of disruption when the challenged speech indirectly relates to a public concern. *Thomas v. Carpenter*, 881 F.2d 828, 831 (9th Cir. 1989).

Under the balancing act required in light of these established and undisputed facts, there can be no question that NUNEZ's First Amendment concerns were tenuous at best and, more importantly, the disruption (and

potential disruption) caused by her untoward behavior was a major source of concern. Certainly this was the state of the law at the time the Judge made the decisions that he did and his evaluation of this effect, even if the subject of disagreement by other employees – still warrants reversal of the Ninth Circuit's opinion.

IV. JUDGE DAVIS WAS ENTITLED TO QUALIFIED IMMUNITY

In addition to refusing to decide pure issues of law before handing deliberations to the jury, the District Court Judge made another crucial error. He refused to allow the issue of qualified immunity to be considered by the trier of fact. He did this even though it could be argued that no clearly established law prohibited the Judge's actions and, moreover, he relied in good faith on the advice of counsel. Both of these issues were raised at the time of trial and should, at the very least, have been subjected to a decision by the trier of fact. The failure to do this warrants the granting of a Writ of Certiorari so that this Court can, once again, correct the Ninth Circuit's abhorrence of the qualified immunity doctrine.

In § 1983 suits, qualified immunity shields government officials from liability if a reasonable government official could have believed his conduct was lawful, in light of clearly established law and the information he possessed. *Stivers v. Pierce*, 71 F.3d 732, 749 (9th Cir. 1995). "This standard requires a two-part analysis: (1) whether the law prohibiting the official conduct was clearly established; and (2) whether a reasonable official could have believed that his conduct complied with the law." *Id.* Further, "the contours of the right must be sufficiently

clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

The central purpose of affording public officials qualified immunity is to protect them from undue interference with their duties and from potentially disabling threats of liability. *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 70 F.3d 1095 (9th Cir. 1995). It allows for mistaken judgments and protects all but the plainly incompetent or those who knowingly violate the law. *Hunter v. Bryant*, 502 U.S. 224, 229 (1991). "This accommodation for reasonable error exists because 'officials should not err always on the side of caution' because they fear being sued." *Id.* at 229.

A. THE RELEVANT LAW WAS NOT CLEARLY ESTABLISHED

In examining this case, it is important to again note NUNEZ' status. She was an "at-will" employee, dischargeable at anytime and for any reason or for no reason. There was no written contract between herself and any party to this litigation which stated otherwise. Therefore, she would not have had an interest in her continued employment sufficient to rise to the level of a Fourteenth Amendment concern. *See Monroe v. Kautz*, 833 F. Supp. 854 (D. Wyo. 1993). That, however, is not the gravamen of NUNEZ's Complaint. Rather, she chooses to focus on the decision by JUDGE DAVIS to not allow perks for individuals who did not assist in his re-election campaign. She claims his attitude was wrong and she was right to disobey him. Law in this area, however, vindicates JUDGE DAVIS's actions.

Assuming JUDGE DAVIS really fired NUNEZ because he did not want unsupportive staff going to these extended seminars, this Court affirmed the validity of such an act when the hiring authority could demonstrate that party affiliation was an appropriate requirement of the effective performance of the public office involved. *See Branti v. Finkle*, 445 U.S. 507, 518, 100 S. Ct. 1287, 1295 (1980). In *Dimmig v. Wahl*, 983 F.2d 86 (9th Cir. 1993), a former deputy sheriff brought a § 1983 action against a sheriff and county alleging his discharge for refusing to assist in the sheriff's re-election campaign violated his Constitutional rights. In deciding to sustain the lower court's grant of a motion to dismiss in favor of defendants on this issue, the Court reasoned the position of deputy sheriff operated with a sufficient level of autonomy and discretionary authority to justify a sheriff's use of political considerations when determining who would serve as his deputies. 983 F.2d at 87. The *Dimmig* Court also cited *Terry v. Cook*, 866 F.2d 373, 377 (11th Cir. 1989), for the proposition that a sheriff had absolute authority over a deputy sheriff's appointment and retention and, therefore, did not violate the First Amendment by discharging deputy sheriffs who did not support his election.

The Illinois Supreme Court reached a similar conclusion in *Fellhauer v. City of Geneva*, 142 Ill. 2d 495, 568 N.E.2d 870, 154 Ill. Dec. 649 (1991). In that case, the former director of the city electric department brought an action against the mayor for retaliatory discharge and civil rights violations. In discussing the § 1983 allegations, it was asserted the plaintiff had been fired for

refusing to aid in collecting post-election campaign contributions. The court noted the proper inquiry was stated in *Branti*. 568 N.E.2d at 881.

> [I]f an employee's private political beliefs would interfere with the discharge of his public duties, his First Amendment rights may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency.
>
> In that respect, the political loyalty of an employee of a policy-making position may be necessary to ensure the implementations of the policies endorsed by the administration of the duly elected representative, policies presumably sanctioned by the electorate.

Id. (citations omitted) "Otherwise, policies formulated by the administration to be seriously undermined by the recalcitrant official 'the people elect are entitled to employ others who hold their confidence; they must do so if they are to carry out the programs they promise to pursue.' " *Id.* (quoting *Bicanic v. McDermott*, 867 F.2d 391, 395 (7th Cir. 1989)). Since the individual fired had the responsibility and a position to implement governmental policy, it was held the position was sufficiently autonomous to warrant such a discharge.

Moreover, the Fifth Circuit Court of Appeals held a retaliatory firing motivated by the fired employee's political support of another party entitled the acting officer to qualified immunity – as law was not clearly established. *Gunaca v. State of Texas*, 65 F.3d 467 (5th Cir. 1995).[12]

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[12] In *Wallace v. Benware*, 67 F.3d 655 (7th Cir. 1995), the court dealt with an issue where a sheriff demoted and harassed a

Voight clearly held that the First Amendment did not require employers to tolerate actions which *they* reasonably believed caused destruction of the work place. No requirement was given under the law that the disruption actually take place or that it be the subject of agreement by the majority of workers in the work place. All that was necessary was that the employer believed this issue. Certainly there was evidence upon which the trier of fact could have determined that JUDGE DAVIS reasonably believed a disruption was taking place. However, this issue was kept from the trier of fact by the unilateral actions of the judge.

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deputy who announced he was opposing the sheriff in an upcoming election. While the court ultimately believed harassment of the employee was not appropriate, it noted that if the sheriff felt disposed to fire the deputy, that would have been permissible. After all, the sheriff was entitled to place in the policy-making position of deputy sheriff loyal and trustworthy individuals who would be most effective in carrying his electoral mandate. 67 F.3d at 661.

Where a police officer believed a superior was engaged in wrongdoing and conducted a secret investigation, the court held the police department was justified in firing that officer because the First Amendment protection regarding the officer's speech and conduct was outweighed by the department's interest in discouraging unofficial internal investigations and maintaining morale. *Machiariello v. Sumner*, 973 F.2d 295 (4th Cir. 1992). *See Campbell v. Towse*, 99 F.3d 820 (7th Cir. 1996) (balancing factors include whether speech or expression was reasonably likely to create problems in discipline or cause disharmony, whether employment relationship ostensibly undermined by the speech of one with personal loyalty and confidence were essential and whether speech impeded employee's ability to perform his or her duties).

In addition, the Ninth Circuit has recently stated, in *Moran v. State of Washington*, 147 F.3d 839 (9th Cir. 1998) that the *Pickering* analysis in wrongful termination/First Amendment cases requires particularized balancing based on the unique facts presented in each case. 147 F.3d at 845. The question of whether or not the employer violated the employee's clearly established constitutional rights is based on the "sensitive *ad hoc* balancing that *Pickering* entails." *Id.* The Ninth Circuit itself stated it would be only the "occasional case" in which existing law is so closely on point that the law related to the issue might be said to be clearly established. 147 F.3d at 847. No case has been found which is directly on point with the issues found in this case. Thus, JUDGE DAVIS was entitled to – at the very least – the issue of qualified immunity being submitted to the jury. More importantly, as a matter of law, these issues were raised prior to trial and could have been decided by the Court as issues of law at any point thereafter. However, neither the District Court Judge nor the Ninth Circuit saw fit to extend qualified immunity to this very proper situation.

B. RELIANCE ON ADVICE OF COUNSEL WARRANTS A GRANT OF QUALIFIED IMMUNITY

In certain "extraordinary circumstances" the objective standard may not end the qualified immunity inquiry. *Harlow*, 457 U.S. at 819; *see, Barnett v. Housing Authority of Atlanta*, 707 F.2d 1571, 1573 (11th Cir. 1983). Courts have generally found the advice of an attorney is a factor in shielding the defendant from liability under § 1983 because it evinces the defendant's good faith. In fact, the Ninth Circuit determined in *Lucero v. Hart*, 915

F.2d 136, 137 (9th Cir. 1990) that while reliance on counsel is not dispositive on whether the defendant satisfied his burden of acting reasonably, "it is evidence of defendant's good faith." *See also Tanner v. Hardy*, 764 F.2d 1024, 1027 (4th Cir. 1985); *Crow v. Lucas*, 595 F.2d 985, 992 (5th Cir. 1979); *Duchesne v. Sugarman*, 566 F.2d 817, 833 n.32 (2nd Cir. 1977).

Whether reliance upon legal advice bars imputation to the defendant of constructive knowledge concerning the laws allegedly violated by his conduct depends on the circumstances of each case. *See Polson v. Davis*, 635 F. Supp. 1130, 1144 (D. Kan. 1986). The relevant factors include how unequivocal, and specifically tailored to the particular facts giving rise to the controversy, the advice was, *Watertown Equip. Co. v. Norwest Bank Watertown*, 830 F.2d 1487, 1496 (8th Cir. 1987); whether complete information had been provided to the advising attorney, *Burk v. Unified School District No. 329*, 646 F. Supp. 1557, 1560-61 (D. Kan. 1986); the prominence and competence of the attorney, *Alexander v. Alexander*, 573 F. Supp. 373, 375 n.4 (M.D. Tenn. 1983); and how soon after the advice was received was the disputed action taken, *Tanner v. Hardy*, 764 F.2d 1024, 1027 (4th Cir. 1985). In the present case, it is respectfully submitted the facts supported a determination, in light of the foregoing case law, that qualified immunity should be granted.

Qualified immunity is ordinarily a formidable defense to overcome where the constitutionality of government conduct is assessed according to a fact-intensive balancing test. *Burnham v. Ianni*, 98 F.3d 1007, 1018 (8th Cir. 1996). *Noyola v. Texas Dept. of Human Resources*, 846 F.2d 1021 (5th Cir. 1988), in the context of First Amendment retaliatory firings, specifically held consideration of

such First Amendment claims involves a case-specific balancing of the employee's First Amendment rights and the government's interest in maintaining discipline and efficiency in the workplace. Given the case-specific balancing nature of this cause of action, it is difficult to ascertain exactly what is, if at all, the "clearly established" law because the analysis of each individual case is extraordinarily fact intensive. *Weisbuch*, 119 F.3d at 783.

JUDGE DAVIS set forth the reasons why he believed termination was appropriate. He was specific and detailed. Considering these facts, counsel provided his legal opinion that termination would be appropriate. JUDGE DAVIS acted on that legal advice and terminated NUNEZ. Therefore, he is entitled to qualified immunity for his objectively reasonable reliance upon the advice of a seasoned legal veteran after full disclosure of the facts.

In sum, there is seemingly clearly established law holding an at-will employee can be terminated without violating the First Amendment when the conduct is not akin to speech, does not heavily weigh on matters of public interest and disrupts the inner-workings of the office such that the efficiency of the governmental office is impinged. Further, JUDGE DAVIS first consulted with counsel before terminating the employee – evidencing his good faith. Because he took reasonable actions in light of the established law and the information he possessed at the time, he must be immune.

CONCLUSION

For the foregoing reasons, Petitioner JUDGE DAVIS respectfully requests this Court exercise its judicial discretion and issue a Writ of Certiorari to consider, in depth, the injustice which has been made against him.

DATED this 10th day of August, 1999.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GEORGIA NUNEZ, *Plaintiff-Appellee,* v. GARY F. DAVIS, *Defendant-Appellant.*	No. 98-15137 D.C. No. CV-93-01212-DWH-RLH OPINION

Appeal from the United States District Court
for the Southern District of Nevada
David W. Hagen, District Judge, Presiding

Argued and Submitted
December 8, 1998 – San Francisco, California

Filed March 12, 1999

Before: Harry Pregerson and Melvin Brunetti,
Circuit Judges, and Ann L. Aiken,* District Judge.

Opinion by Judge Pregerson

COUNSEL

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* The Honorable Ann L. Aiken, United States District Judge for the District of Oregon, sitting by designation.

Kristina S. Holoman, Las Vegas, Nevada, for the plaintiff-appellee.

OPINION

PREGERSON, Circuit Judge:

Georgia Nunez is a former court administrator for the City of North Las Vegas Municipal Court. In 1993, a conflict developed between Nunez and her supervisor, Judge Gary Davis, who instructed Nunez to limit attendees at training seminars to those court employees who had worked in his reelection campaign. In protest, Nunez arranged for two court clerks who did not work in Davis's reelection campaign to attend a training seminar. Davis fired Nunez. She brought a 42 U.S.C. § 1983 action against Davis and against the City of North Las Vegas. Nunez's complaint charged that Davis, acting under color of state law, violated her First Amendment right to free speech when he fired her. The district court denied Davis's repeated motions for qualified immunity. The court granted the city's motion to dismiss on the ground that the municipal court system has Eleventh Amendment immunity. The case then proceeded to trial against Davis. The jury returned a verdict in Nunez's favor for $141,446.31.

Davis appeals from the judgment entered against him, the denial of a motion for summary judgment, and the denial of a renewed motion for judgment as a matter of law under Federal Rule of Civil Procedure 50. He

makes three arguments on appeal: (1) that Nunez's conduct in allowing the two court clerks to attend the training seminar is not constitutionally protected speech; (2) that the district court erred in denying Davis' motions for qualified immunity and in declining to submit the qualified immunity issue to the jury; and (3) that the district court erred in submitting the First Amendment "public concern" issue and the issue whether Nunez's conduct was speech to the jury. We address each of Davis's arguments in turn and affirm the district court for the following reasons.

I.

A. Nunez's conduct implicates the First Amendment.

To determine whether a public employee's supervisor violated an employee's First Amendment right to free speech, we must first determine whether speech was involved at all. Davis argues that Nunez's conduct in allowing the two court clerks to attend the training seminar was not speech because she merely refused to follow his orders and her conduct did not communicate any particular message. But we "have long recognized that [First Amendment] protection does not end at the spoken or written word." *Texas v. Johnson*, 491 U.S. 397, 404 (1989). Non-verbal conduct implicates the First Amendment when it is intended to convey a "particularized message" and the likelihood is great that the message would be so understood. *Id.* Nunez testified that she intended by her conduct to convey a message to the court clerks and co-workers that Davis should not condition

court clerks's benefits on working in his reelection campaign. The court clerks, as well as co-employees, testified that they understood that message. Thus, Nunez's expressive conduct (hereafter "symbolic speech" or "speech") possessed "sufficient communicative elements to bring the First Amendment into play." *Texas*, 491 U.S. at 404.

Another critical inquiry is whether the public employee's speech addresses a matter of public concern. *See Allen v. Scribner*, 812 F.2d 426, 430 (9th Cir. 1987).[1] Whether a public employee's speech or expressive conduct involves a matter of public concern depends upon "the content, form, and context of a given statement, as revealed by the whole record." *Connick v. Myers*, 461 U.S. 138, 147-48 (1983). A public employee's speech or expressive conduct deals with a matter of public concern when it "can be fairly considered as relating to a matter of political, social, or other concern to the community." *Voigt v. Savell*, 70 F.3d 1552, 1559 (9th Cir. 1995). Speech that deals with "complaints over internal office affairs" is not protected when it is not relevant to the public's evaluation of a governmental agency's performance. *Connick*, 461 U.S. at 149.

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[1] The determination whether speech involves a matter of public concern is a question of law. *See Connick v. Myers*, 461 U.S. 138, 148 n.7 (1983). Although, as we discuss *infra*, the district court erred by submitting this question to the jury, the court implicitly held that Nunez's speech involved a matter of public concern when, in denying Davis' motion for judgment as a matter of law, the court noted that "the government has no interest in the chilling of an employee's political expression." We review this question de novo. *Allen*, 812 F.2d at 430 n. 8.

The Supreme Court has held that speech similar to Nunez's inherently concerns the public interest. In *Connick*, the Court considered whether an internal office questionnaire distributed by an assistant district attorney who objected to being transferred constituted protected speech on a matter of public concern. The questionnaire concerned "office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns." *Id.* at 141. The Court determined that all items in the questionnaire – except the political campaign question – were matters that addressed internal office policy and did not involve speech on a matter that would potentially concern the public. *See id.* at 148.

In contrast, the Court in *Connick* determined that whether any assistant district attorney felt pressured to work in political campaigns did involve a matter of potential public concern because "there is a demonstrated interest in this country that government service should depend upon meritorious performance rather than political service." *Id.* at 149. The Court further noted that such speech involved a matter of public concern because "official pressure upon employees to work for political candidates not of the worker's own choice constitutes a coercion of belief in violation of fundamental constitutional rights." *Id.* (citing *Branti v. Finkel*, 445 U.S. 507, 515-516 (1980); *Elrod v. Burns*, 427 U.S. 347 (1976)). Thus, the Court concluded that the issue "whether assistant district attorneys are pressured to work in political campaigns is a matter of interest to the community upon which it is essential that public employees be able to

speak out freely without fear of retaliatory dismissal." *Connick*, 461 U.S. at 149.

Nunez spoke out to protect the rights of court employees pressured by Davis to work on his reelection campaign.[2] She did not act to further her own personal interests. *See Brewster v. Board of Educ.*, 149 F.3d 971, 980 (9th Cir. 1998); *McKinley v. City of Eloy*, 705 F.2d 1110, 1114 (9th Cir. 1983). In addition, her symbolic speech was relevant to the public's evaluation of the performance of a public official and the court system. *See Voigt*, 70 F.3d at 1560 (finding that court clerk's speech regarding possible hiring bias against out-of-state applicants touched on a matter of public concern because the public has an interest in knowing whether the court treats its job applicants fairly).

Davis argues that while the content of Nunez's symbolic speech may have addressed a matter of inherent public concern, the form and context of her speech did not make it sufficiently "public" to trigger First Amendment protection. Davis contends that Nunez's conduct arose out of a fit of spite, and did not communicate any message to her co-workers. In addition, Davis points out that Nunez did not express her concerns to the press or to any other public official.

But Davis's argument has no basis in law or fact. Nunez did communicate a message through her symbolic speech. One of the clerks attending the seminar testified

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[2] As Nunez testified, "I was tired of him pressuring everybody to work on the campaign. . . . I felt very protective of those clerks."

she was aware of Davis's "policy" disallowing individuals who did not help in his campaign from attending training seminars, and that she was surprised she was allowed to attend. Marilyn Bell, a court employee, testified that everyone in the office knew of Davis' policy and that Nunez took a risk by sending the clerks to the seminar. Further, the fact that Nunez did not take her concerns to the press "does not vitiate the status of the statement as addressing a matter of public concern." *Rankin v. McPherson*, 483 U.S. 378, 386-87 n.11 (1986). There is no legal requirement that a public employee's speech be made public in order to constitute speech on a matter of public concern. *See, e.g., Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410, 413-17 (1979) (stating that First Amendment protection applies when a public employee arranges to communicate privately with employer rather than express his views publicly).

Davis also argues that Nunez's conduct is not protected speech but unprotected insubordination. As this court has held, "[i]ssuance of unauthorized orders by an employee, on behalf of the institution, is not protected speech." *Nelson v. Pima Community College*, 83 F.3d 1075, 1081 (9th Cir. 1996). But the cases Davis cites for this proposition are inapposite. In *Nelson*, this court considered whether a college administrator who disagreed with the college's affirmative action policy could receive First Amendment protection for actions she took to undermine the policy. The employee in that case had fundamental differences with her supervisor and official college policy. On numerous occasions, she ordered departments to halt hiring faculty so she could first review their affirmative action records, despite instructions from her superiors

that she had no authority to make such demands. Nelson's disagreement with the college president and the college policy, and her refusal to perform her duties in accordance with their instructions, "threw the whole college into turmoil." *Id.* at 1080.

Another case cited by *Davis*, *Kotwica v. City of Tucson*, 801 F.2d 1182 (9th Cir.1986), involved a recreation supervisor in the city parks department who, against the direct orders of her supervisor, used an official press interview to contradict agency policy. This court found the employee did not have a First Amendment right to appropriate an official interview for her own purposes and to misrepresent the city's position, because the city also had a "vital speech interest" in the "accurate announcement of its own policy." *Id.* at 1184.

Unlike the employees in these cases, Nunez expressed herself as a public citizen about what she believed to be Davis's unjust practice concerning attendance at training seminars. Second, in contrast to *Nelson*, where the subordinate employee had broad, philosophical, and political differences with the president and the college employing her, Nunez did not disagree with Davis on general matters of court policy. Nunez only disagreed with Davis on one matter of public concern – his conditioning of attendance at training seminars on assistance in his reelection campaign. Her conduct should not be labeled as insubordination, but rather, symbolic speech on a matter of public concern.

B. Nunez's conduct is constitutionally protected under the *Pickering* balancing test.

Even where a public employee's speech implicates a genuine matter of public concern, a public employer may still be justified in firing the employee. In determining a public employee's rights to free speech, courts must strike a balance "between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968). The employer's interest outweighs the employee's interest in speaking on a matter of public concern if the employee's speech "impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." *Rankin*, 483 U.S. at 388.

We conclude that Davis did not show that Nunez's speech impaired discipline or harmony among co-workers. Davis testified that the absence of the clerks for two days to attend the training seminar disrupted office routine and exacerbated the court's backlog. Everyone else in the office testified that the backlog existed prior to Nunez's speech, and that the problem was not made worse as a result of her speech.

Davis also argues that Nunez's speech impaired his "close working relationship" with Nunez. There is little merit to this claim. As this court has previously stated,

"real, not imagined, disruption is required, and the 'close working relationship' exception cannot serve as a pretext for stifling legitimate speech or penalizing public employees for expressing unpopular views." *McKinley*, 705 F.2d at 1115. A public employer cannot claim disruption of a close personal relationship to cover up animus toward an employee's speech and a desire to silence the employee.

Furthermore, Davis did not show that Nunez's symbolic speech interfered with her ability to perform her job or the regular operation of the court. Davis testified that his relationship with Nunez became "quite strained" after the seminar incident and that the erosion of their relationship had an adverse impact on the court, but Bell testified that Nunez clearly remained loyal to Davis and there was no noticeable difference in Nunez's and Davis's relationship. In fact, Bell said she was "shocked" when Davis fired Nunez. As the verdict below suggests, the jury simply did not find Davis's testimony credible.

In addition, the verdict demonstrates that the jury rejected Davis's justifications for firing Nunez as pretextual. Nunez testified that prior to her termination, Davis told her that she had "failed him" for a number of reasons, including her failure to change stained ceiling tiles in his office, to clean up leaves outside the office, and to obtain his desired raise of $7,500 from the city council. But the jury found that Nunez's speech – and not Davis' stated reasons – was the substantial motivating factor in Davis' decision to fire Nunez, and that she would not have been fired but for her speech.

In short, Davis has offered no credible evidence to tip the scales in his favor, and thus has failed to demonstrate a state interest that outweighs Nunez's First Amendment rights. Nunez's expressive conduct of allowing the court clerks to attend the training seminar is therefore constitutionally protected under the *Pickering* balancing test.

II.

Whether a public official is entitled to qualified immunity is a question of law. *See Hyland v. Wonder*, 117 F.3d 405, 409 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1166 (1998). Thus, the district court did not err in declining to submit this issue to the jury.

A district court's decision on qualified immunity is reviewed de novo.[3] *See id.* To preclude a state official from receiving qualified immunity for dismissing a public employee in violation of her First Amendment rights, Nunez must show that her asserted right was clearly established and that her employer could not have reasonably believed that the dismissal was proper. *See Moran v. Washington*, 147 F.3d 839, 844-85 (9th Cir.1998). Nunez has met that burden. First, her speech clearly involved a matter of public concern. *See Connick*, 461 U.S. at 149. In addition, on balance, Nunez's interest in exercising her First Amendment rights clearly outweighs Davis's asserted interest in maintaining an efficient workplace.

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[3] Davis is not entitled to absolute immunity because the hiring and firing of court personnel is a non-judicial act for absolute immunity purposes. *See Forrester v. White*, 484 U.S. 219, 229 (1988).

The jury found Davis's testimony of office disruption not credible, and his other justifications for firing Nunez – her failure to change stained ceiling tiles in his office, to clean up leaves outside the office, and to obtain his desired raise of $7,500 – pretextual. This being the case, there were no factors weighing in Davis's favor, and thus Nunez's right at issue was clearly established. Because the jury found that Nunez was fired for her speech and not for the other reasons Davis offered, Davis could not have reasonably believed that Nunez's dismissal was proper.

Finally, Davis argues that he is entitled to qualified immunity because he consulted the City Attorney, Richard Maurer, prior to firing Nunez. Davis argues that his reliance on Maurer's advice that he could legally terminate Nunez should bar imputation to him of "constructive knowledge concerning the law allegedly violated by his conduct." Reliance on the advice of counsel, however, is not dispositive on the issue whether Davis acted reasonably. *See Lucero v. Hart*, 915 F.2d 1367, 1371 (9th Cir. 1990). Here, Davis's argument is vitiated by Maurer's testimony that Nunez's speech was not among the reasons Davis gave him for his desire to dismiss Nunez. In light of this fact, it was not reasonable for Davis to rely on Maurer's advice that he could legally dismiss Nunez. Accordingly, the district court correctly ruled that Davis was not entitled to qualified immunity.

III.

The district court erroneously submitted to the jury the question whether Nunez's speech implicated a matter

of public concern and whether her conduct was speech. This is properly a question of law. *See Connick*, 461 U.S. at 148 n.7. Error in instructing a civil jury does not require reversal if it is more likely than not harmless. *See Benigni v. City of Hemet*, 879 F.2d 473, 479 (9th Cir.1988). Here, the district court's error is harmless because, as the above discussion demonstrates, Nunez's speech involved a matter of public concern.

AFFIRMED.

AO 450 (Rev. 5/85) Judgment in a Civil Case

United States District Court

DISTRICT OF NEVADA

GEORGIA NUNEZ,

Plaintiff,

V.

GARY DAVIS, ETAL,

Defendants.

JUDGMENT IN A CIVIL CASE

(Filed Sept. 23, 1997)

CASE NUMBER: CV-S-93-1212-DWH (RLH)

[X] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[ ] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the jury finds defendant terminated plaintiff in violatio [sic] of plaintiffs rights under the First Amendment of the United States Constitution and awards plaintiff the sum of $141,446.31.

September 23, 1997
Date

LANCE S. WILSON
Clerk:

/s/ Donna Casey
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
LAS VEGAS, NEVADA

GEORGIA NUNEZ, Plaintiff(s), vs. GARY DAVIS, Defendant(s).	CV-S-93-1212-DWH (RLH) MINUTES OF THE COURT September 10, 1997

PRESENT: HONORABLE DAVID W. HAGEN, U.S. DISTRICT JUDGE

Depty Clerk: Donna Casey
Reporter: Margaret Griener

Counsel for Plaintiff(s): Kristina S. Holman

Counsel for Defendant(s): Walter R. Cannon, Peter M. Angulo

PROCEEDINGS: JURY TRIAL (DAY 3)

2:05 p.m. Court convenes out of the presence of the jury and the parties.

Court confers telephonically with counsel on a note received from the jury and the response to be given the jury.

2:12 p.m. Court reconvenes in the presence of the jury. Counsel and the parties are not present.

Court responds to the jury's note.

2:15 p.m. Court stands at recess.

3:05 p.m. Court reconvenes in the presence of the jury.

Verdict is read in open court. The Jury finds by a preponderance of the evidence that Defendant terminated Plaintiff in violation of Plaintiff's rights under the First Amendment of the United States Constitution and awards Plaintiff the sum of One Hundred Forty-One Thousand Four Hundred Forty-Six Dollars and Thirty-One Cents ($141,446.31). The Court finds the verdict is unanimous.

Jury is excused from further jury service.

IT IS ORDERED a telephonic hearing on Defendant's Rule 50 Motion is set on the Court's calendar of **Monday, September 15, 1997, at 2:00 p.m.**

3:13 p.m. Court adjourns.

LANCE S. WILSON, CLERK

By: /s/ Donna Casey
Deputy Clerk

EXHIBIT "1"

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GEORGIA NUNEZ, Plaintiff-Appellee, v. GARY F. DAVIS, Defendant-Appellant.	No. 98-15137 D.C. No. CV-93-01212-DHW-RLH ORDER (Filed May 12, 1999)

Before: PREGERSON and BRUNETTI, Circuit Judges, and AIKEN,[1] District Judge.

The members of the panel that decided this case voted unanimously to deny the petition for rehearing. Judges Pregerson and Brunetti voted to reject the suggestion for rehearing en banc and Judge Aiken so recommends.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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[1] The Honorable Ann L. Aiken, United States District Judge for the District of Oregon, sitting by designation.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
LAS VEGAS, NEVADA

GEORGIA NUNEZ, Plaintiff(s), vs. GARY DAVIS, et al., Defendant(s).	CV-S-93-1212-DWH (RLH) MINUTES OF THE COURT September 15, 1997

PRESENT: HONORABLE DAVID W. HAGEN,
U.S.DISTRICT JUDGE

Deputy Clerk: Donna Casey

Reporter: Margaret Griener

Counsel for Plaintiff(s): Kristina S. Holman

Counsel for Defendant(s): Walter T. Cannon

PROCEEDINGS: TELEPHONIC HEARING ON DEFENDANT'S MOTION FOR JUDGMENT AS A MATTER OF LAW PURSUANT TO RULE 50

2:00 p.m. Court convenes.

Arguments are presented by Mr. Cannon and Ms. Holman.

IT IS ORDERED the Defendant's Motion for Judgment as a Matter of Law Pursuant to Rule 50 is **Denied**. The Court finds there was sufficient evidence for a reasonable jury to find plaintiff's attempts to protect the First Amendment rights of two court employees under her supervision from the unconstitutional coercion by

defendant of withholding perks from them if they did not support his election campaign was a material and substantial factor in his decision to fire the plaintiff, and, therefore, a violation of 42 U.S.C. § 1993.

2:23 p.m. Court adjourns.

LANCE S. WILSON, CLERK

By: /s/ Donna Casey
Deputy Clerk

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

GEORGIA NUNEZ,	:	No. CV-S-93-1212-DWH
Plaintiff,	:	United States Courthouse
	:	400 South Virginia Street
-vs-	:	Reno, Nevada
GARY DAVIS,	:	September 15, 1997
Defendant.	:	2:00 p.m.
	:	

.....

TRANSCRIPT OF TELEPHONIC HEARING
ON DEFENDANT'S RULE 50 MOTION
BEFORE THE HONORABLE DAVID W. HAGEN,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

KRISTINA S. HOLMAN
Attorney at Law
3311 South Rainbow Boulevard
Las Vegas, Nevada

FOR THE DEFENDANT:

RAWLINGS, OLSON, CANNON,
GORMLEY & DESRUISSEAUX
Attorneys at Law
By Walter R. Cannon
301 East Clark Avenue
Las Vegas, Nevada

ORIGINAL

Proceedings recorded by mechanical stenography produced by computer-aided transcript

Reported by: Margaret E. Griener, CCR #3, RDR
Official Reporter

* * *

[p. 14] Ms. Nunez.

We believe that the governmental interests clearly outweigh any constitutional protection that Ms. Nunez's speech would have had in the first instance.

And based upon that, plus the law cited to you in our trial brief, as well as our emergency motion for summary judgment, we would submit the case for your decision, your Honor.

THE COURT: All right. The case is now submitted for decision.

This is a very –

MR. CANNON: I'm sorry, your Honor, you cut out, I didn't hear that.

THE COURT: I said the case is now submitted for decision, and I was about to say this is difficult in the sense that there isn't anything either side has submitted by way of decision of law that is on all fours with the question that was presented here with respect to the First Amendment.

The persons who spoke by their conduct were the two supervised employees. Their speech was in not supporting Davis for reelection as judge which they had been commanded to do.

The plaintiff, as their immediate or at least their intermediate supervisor between Davis and them, protected their speech and was punished for it.

[p. 15] Now, the government has no interest in the chilling of an employee's political expression.

In sum – and this, I'm sure, will make for interesting appellate briefs, in sum, I find that there was sufficient evidence for a reasonable jury to find plaintiff's attempts to protect the First Amendment rights of two court employees under her supervision from the unconstitutional coercion by defendant of withholding perks from them if they did not support his election campaign was a material and substantial factor in his decision to fire the plaintiff, and, therefore, a violation of 42 USC, Section 1983.

Thank you very much for your arguments. The motion under Rule 50 by the defendant is denied, and we are adjourned.

MR. CANNON: Thank you, your Honor.

MS. HOLMAN: Thank you.

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Margaret E. Griener 11/24/97
Margaret E. Griener, Date
CCR #3, RDR

Official Reporter

* * *

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
LAS VEGAS, NEVADA

GEORGIA NUNEZ, Plaintiff(s), vs. GARY DAVIS, Defendant(s).	CV-S-93-1212-DWH (RLH) MINUTES OF THE COURT September 9, 1997

PRESENT: HONORABLE DAVID W. HAGEN, U.S. DISTRICT JUDGE

Deputy Clerk: Donna Casey Reporter: Margaret Griener

Counsel for Plaintiff(s): Kristina S. Holman

Counsel for Defendant(s): Walter R. Cannon, Peter M. Angulo

PROCEEDINGS: JURY TRIAL (DAY 2)

8:45 a.m. Court convenes.

Court informs the jury and counsel that Juror Number One, Anthony Gilpin, has not arrived and will therefore be excused.

GEORGIA NUNEZ, having previously been sworn, resumes the stand and testifies further on direct examination by Ms. Holman, cross examination by Mr. Cannon and redirect examination by Ms. Holman. Plaintiff's Exhibits 7, 8, 9 and 10 are ordered admitted into evidence.

10:10 a.m. Jury is admonished and excused. Court stands at recess.

10:35 a.m. Court reconvenes in the presence of the jury.

GEORGIA NUNEZ, having previously been sworn, resumes the stand and testifies further on redirect examination by Ms. Holman and recross examination by Mr. Cannon, then is excused.

MARY DURAN, called on behalf of the Plaintiff, is sworn and testifies on direct examination by Ms. Holman and cross examination by Mr. Angulo, then is excused.

The Plaintiff rests.

At sidebar, Mr. Cannon makes a Motion for Judgment as a matter of law pursuant to Rule 50. The Court finds the motion stands submitted.

11:05 a.m. Jury is admonished and excused. Court stands at recess.

1:00 p.m. Court reconvenes in the presence of the jury.

LINDA HINSON, called on behalf of the Defendant, is sworn and testifies on direct examination by Mr. Angulo and cross examination by Mr. Holman, then is excused.

LINDA STILES, called on behalf of the Defendant, is sworn and testifies on direct examination by Mr. Angulo and cross examination by Ms. Holman, then is excused.

RICHARD C. MAURER, called on behalf of the Defendant, is sworn and testifies on direct examination by Mr. Cannon, cross examination by Ms. Holman and redirect examination by Mr. Cannon, then is excused.

The Defendant rests.

1:45 p.m. Jury is admonished and excused. Court stands at recess.

2:40 p.m. Court reconvenes out of the presence of the jury.

Ms. Holman informs the Court the plaintiff has no objections to the instructions the Court intends to give.

Mr. Cannon places on the record his objections to the instructions the Court intends to give.

2:50 p.m. Court stands at recess.

3:05 p.m. Court reconvenes in the presence of the jury.

Court instructs the jury on the final jury instructions.

Closing arguments are presented by Ms. Holman on behalf of the Plaintiff and Mr. Cannon on behalf of the Defendant.

Rebuttal closing arguments are presented by Ms. Holman on behalf of the Plaintiff.

Court instructs the jury on the order on deliberations.

Bailiff is sworn to take charge of the jury.

4:10 p.m. Jury retires to deliberate. Court stands at recess.

4:30 p.m. Court reconvenes out of the presence of the jury.

Court and counsel confer on the form of verdict to be submitted to the jury.

4:33 p.m. Court stands at recess.

4:40 p.m. Court reconvenes in the presence of the jury. Counsel and the parties are not present.

IT IS ORDERED this trial is continued to **Wednesday, September 10, 1997, at 8:30 a.m.**

Jury is admonished and excused.

4:45 p.m. Court adjourns.

On reconsideration, the Court finds it erred on the issue of the verdict form to which Plaintiff objected in that the objected-to verdict form would be inconsistent with instruction number twelve given to the jury which shows that the fourth element of Plaintiff's constitutional claim is that she suffered damages as a result of her termination. Accordingly, the possibility of *injuria absque damno* is inapplicable to this claim. The Court has corrected the verdict form before submission to the jury, the jury having retired following selection of a foreperson and having decided to begin deliberations at 8:30 a.m. on September 10, 1997.

LANCE S. WILSON, CLERK

By: /s/ Donna Casey
Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

GEORGIA NUNEZ,	:	No. CV-S-93-1212-DWH
Plaintiff,	:	United States Courthouse
	:	300 Las Vegas Boulevard
-vs-	:	South
GARY DAVIS,	:	Las Vegas, Nevada
	:	September 9, 1997
Defendant.	:	8:30 a.m.

****

TRANSCRIPT OF CROSS-EXAMINATION AND RECROSS-EXAMINATION OF PLAINTIFF NUNEZ BEFORE THE HONORABLE DAVID W. HAGEN, UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF: KRISTINA S. HOLMAN
Attorney at Law
3311 South Rainbow Boulevard
Las Vegas, Nevada

FOR THE DEFENDANT: RAWLINGS, OLSON, CANNON, GORMLEY & DESRUISSEAUX
Attorneys at Law
By Walter Cannon and Peter Angulo
301 East Clark Avenue
Las Vegas, Nevada

ORIGINAL

Proceedings recorded by mechanical stenography produced by computer-aided transcript

Reported by: Margaret E. Griener, CCR #3, RDR
Official Reporter

* * *

[p. 39] Now, from the defendant, objections to the stack of instructions you've been handed?

MR. CANNON: None to the stack I've been handed, your Honor.

THE COURT: All right. Objections for instructions that are not being given.

MR. CANNON: Yes, your Honor.

I believe in Exhibit B to our joint filing, which is entitled Joint Special Jury Instructions, under Exhibit B, I submitted instructions that plaintiff had objected to, and I've numbered them, or they're numbered in sequential order.

You want me to hand them to the Court?

THE COURT: No, I want you to identify them as they can be located on the record from this transcript by an appellate court.

MR. CANNON: Okay. I believe that I'm entitled to the instruction which I'll make – I'll offer as Defendant's Proposed Exhibit No. 1 Rejected. Could I do that?

THE COURT: Sure.

MR. CANNON: Okay. I believe I am entitled to Defendant's Proposed Exhibit No. 1, if I can hand it to your clerk.

Do you want me to read it or just –

THE COURT: Well, I would like you to identify its position. In other words, is this an instruction that was

[p. 40] filed on a given day and does it have a given position in the –

MR. CANNON: Yes, it does, and maybe that's the way –

THE COURT: Right.

MR. CANNON: This was submitted as Exhibit B –

THE COURT: All right.

MR. CANNON: – to the Joint Special Instructions filed by the parties on September 5th, 1997.

THE COURT: All right.

MR. CANNON: And this particular instruction is contained at page nine of Exhibit B.

THE COURT: All right.

MR. CANNON: It starts with the words, "Even if you find the plaintiff" –

THE COURT: Okay.

MR. CANNON: There is a portion of that instruction that talks in terms of a public employee's insubordination, refusal to follow orders or issuing of unauthorized orders.

THE COURT: All right.

MR. CANNON: I believe that that language should be included. You have a similar instruction on governmental interest, but you have not put that language in.

It is my belief that that language is cited or, indeed, is substantiated by the Weisbuch versus County of Los [p. 41] Angeles, Ninth Circuit case, the Nelson versus Pima County College, Ninth Circuit case, and the Kotwica versus City of Tucson case that were cited at the bottom of that proposed instruction as well as the other cases cited there.

THE COURT: All right. Let's go to your next objection.

MR. CANNON: The next objection that I have is – this was an instruction that was stipulated to by the parties that you have apparently decided not to give.

It is contained in defendant's – or in – it is contained in Exhibit A to the Joint Special Jury Instructions filed on September 5th, 1997. It is on the fifth page of that exhibit.

It starts with,

> "Even if the elements are established, Gary Davis may still be immune from liability based on the doctrine of qualified immunity."

It is our position that we pled that and that we're entitled to that particular defense. Plaintiff's counsel stipulated that we were, and the Court has apparently decided not to give that instruction.

THE COURT: Yes.

MR. CANNON: Okay. In addition, it is my belief that with that instruction that should have been given, the Court should have also given, from the document filed on [p. 42] September 5th, 1997, Exhibit B, page thirteen, which details the qualified immunity defense as it relates to advice of counsel.

THE COURT: All right.

MR. CANNON: I would also – I also believe that I would have been entitled to or should have been entitled to Exhibit B of the same document, page seven, which deals with, again, the communicative nature of First Amendment interest and what is required thereunder.

That is – for record purposes, I believe I would be entitled to that instruction as well.

Finally, your Honor, I would like to make a general objection to the instructions that you have given to the extent that I believe the law, as far as whether something is public speech, whether something – whether the governmental interest of that speech outweighs the person's right to speak it.

I believe the Supreme Court teachings in Connick and Umbehr, as well as the Ninth Circuit teachings in Weisbuch and Nelson, tell us that those are questions of law for the Court to decide, not matters for the jury to decide.

I think those instructions would be inappropriately addressed to the jury because they're asking the jury to decide legal questions which I believe are exclusively within your Honor's purview.

[p. 43] I respectfully submit that.

THE COURT: All right. Thank you.

MR. CANNON: Thank you.

THE COURT: All right.

And let me say for the record on the question of qualified immunity, qualified immunity requires an inquiry into what defendant knew or should have known as to the legality of his conduct in denying employment perks to those who refused to campaign for him and firing his chief of staff for refusing to enforce his denial.

His evidence is, while he said this, and said this was his policy, he did not mean it. He said that a number of times. As did his counsel in opening statement.

Thus, his proof cannot include a qualified immunity defense for having been advised and reasonably believing that he could fire his chief of staff for violating that directive because, by his own testimony, it was not ever truly his directive.

Nothing to the contrary or additional is presented by the testimony of his attorney. That is the reason I have declined to give the qualified immunity instruction.

Okay. Pull yourselves together, and we'll have the jury in in about five minutes, and I'll read the instructions and – well, wait.

We've got to go to the industrial strength copying

* * *

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
LAS VEGAS, NEVADA

GEORGIA NUNEZ, Plaintiff(s), vs. GARY DAVIS, Defendant(s).	CV-S-93-1212-DWH (RLH) MINUTES OF THE COURT September 8, 1997

PRESENT: HONORABLE DAVID W. HAGEN, U.S.DISTRICT JUDGE

Deputy Clerk: Donna Casey Reporter: Margaret Griener

Counsel for Plaintiff(s): Kirstina S. Holman

Counsel for Defendant(s): Walter R. Cannon, Peter M. Angulo

PROCEEDINGS: JURY TRIAL (DAY 1)

8:25 a.m. court convenes.

IT IS ORDERED Defendant's Emergency motion for Summary Judgment is *denied*.

Court and counsel confer on jury instructions and the order of trial proceedings.

Upon the motion of Mr. Cannon, IT IS ORDERED the Rule of Exclusion is invoked.

8:35 a.m. Court stands at recess.

9:05 a.m Court reconvenes and thirty-seven prospective jurors enter the courtroom.

Court excuses seven prospective jurors for personal hardship reasons.

9:15 a.m. Voir dire oath administered to prospective jurors. Clerk seats fourteen prospective jurors. Voir dire proceeds.

10:05 a.m. Jury is passed for cause. Court stands at recess.

10:20 a.m. Court reconvenes. Counsel exercise peremptory challenges. Jury is empaneled. (See attached lists.)

10:25 a.m. Jury is sworn. Court excuses unselected prospective jurors. Court instructs the jury on the order of trial proceedings.

Opening statements are presented by Ms. Holman on behalf of the plaintiff and Mr. Angulo on behalf of the defendant.

GARY J. DAVIS, called on behalf of the plaintiff, is sworn and testifies on direct examination by Ms. Holman. Plaintiff's Exhibits 1 and 3 are ordered admitted into evidence.

11:55 a.m. Jurors are admonished and excused. Court stands at recess.

1:30 p.m. Court reconvenes in the presence of the jury.

GARY J. DAVIS, having previously been sworn, resumes the stand and testifies further on direct examination by Ms. Holman, cross examination by Mr. Cannon and redirect examination by Ms. Holman, then is excused. Plaintiff's Exhibits 5 and 11 are ordered admitted into evidence.

MARILYN ANTOINETTE BELL, called on behalf of the plaintiff, is sworn and testifies on direct examination by Ms. Holman.

3:05 p.m Jury is admonished and excused. Court stands at recess.

3:25 p.m. Court reconvenes in the presence of the jury.

MARILYN ANTOINETTE BELL, having previously been sworn, resumes the stand and testifies further on cross examination by Mr. Angulo, then is excused.

YOLANDA ROYBAL, called on behalf of the plaintiff, is sworn and testifies on direct examination by Ms. Holman, cross examination by Mr. Angulo and redirect examination by Ms. Holman, then is excused.

GEORGIA NUNEZ, Plaintiff, called on her own behalf, is sworn and testifies on direct examination by Ms. Holman. Plaintiff's Exhibit 2 is ordered admitted into evidence.

IT IS ORDERED this trial is continued to Tuesday, September 9, 1997, at 8:30 a.m.

Jury is admonished and excused.

5:00 p.m. Court adjourns.

LANCE S. WILSON, CLERK

By: /s/ Donna Casey
Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

GEORGIA NUNEZ, Plaintiff,

vs.

GARY DAVIS, Individually and in his Official Capacity, CITY OF NORTH LAS VEGAS, a Municipal Corporation, DOES 1 through 20, Inclusive,

Defendants.
_____/

CV-S-93-01212-DWH (RLH)

ORDER

(Filed Jan. 30, 1997)

Plaintiff Georgia Nunez sues Municipal Court Judge Gary Davis for violations of constitutional, federal, and state law arising out of her termination as Court Administrator of the Municipal Court for the City of North Las Vegas (#7). Judge Davis moves for summary judgment on the basis of qualified immunity (#30). Plaintiff requests entry of default (#32) which defendants oppose (#34).

FACTUAL AND PROCEDURAL BACKGROUND

The facts of this case are set out in detail in the court's prior order (#24). Essentially, plaintiff was the Court Administrator of the Municipal Court for the City of North Las Vegas until she was terminated by Judge Davis in October 1993. Plaintiff alleges Judge Davis discriminated against her and others on the basis of sex and

race, that he forced her and others to work on his campaign for re-election, and that his conduct was improper in several respects. She claims she was fired primarily for allowing employees to go to a seminar, which was against Davis's wishes because the employees had refused to work on his campaign. Plaintiff brings federal claims under 42 U.S.C. § 1983 and Title VII, as well as several state law claims.

In the earlier order, this court dismissed the City of North Las Vegas. The court also dismissed the § 1983 claim against Judge Davis in his official capacity, and the Title VII claims against Judge Davis were dismissed for lack of subject matter jurisdiction. The parties stipulated to dismissal of the state law claims. Judge Davis now moves for summary judgment on grounds of qualified immunity. Plaintiff moves for default, claiming Judge Davis did not answer the Complaint in timely manner.

MOTION FOR SUMMARY JUDGMENT

STANDARD

Summary judgment should be granted if the evidence, read in the light most favorable to the nonmoving party, demonstrates that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Taylor v. List*, 880 F.2d 1040, 1044 (9th Cir. 1989). "There is no genuine issue of material fact if the party opposing the motion 'fails to make an adequate showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.' " *Taylor*, 880 F.2d at 1045 (quoting *Celotex*

Corp. v. Catrett, 477 U.S. 317, 322 (1986)). Nor is there a genuine issue of fact if a rational trier of fact could not find in favor of the party opposing the motion for summary judgment. *Taylor*, 880 F.2d at 1045 (citing *Matsushita Elec. Indus. v. Zenith Radio*, 475 U.S. 574, 586 (1986)). Finally, conclusory allegations that are unsupported by factual data cannot defeat a motion for summary judgment. *Taylor*, 880 F.2d at 1045.

ANALYSIS

The Supreme Court has recognized two kinds of immunity for government officials sued under § 1983: absolute immunity and good faith or "qualified" immunity. ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 8.6 at 461 (2d ed. 1994). In *Harlow v. Fitzgerald*, the Court discarded the subjective component of the test for qualified immunity, stating

> government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.
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> 457 U.S. 800, 818 (1982).

Because plaintiff alleges several different types of illegal conduct, the court must examine each alleged violation to determine whether it implicates "clearly established statutory or constitutional rights." Plaintiff's first amended complaint alleges sex discrimination, race discrimination and wrongful termination in violation of the First Amendment.

A. Race and Sex Discrimination

Regarding the question of whether sex discrimination violates a clearly established right, the Ninth Circuit recently has stated

> Subjecting a woman to abuse on the job is exactly the kind of sex discrimination prohibited by the Equal Protection Clause and Title VII. A reasonable state official would have understood this during [plaintiff's] tenure at the Probation Division.

Bator v. State of Hawaii, 39 F.3d 1021, 1029 (9th Cir. 1994).

The Ninth Circuit has made a similar finding as to invidious racial discrimination. *See Gutierrez v. Mun. Ct. of S.E. Judicial Dist.*, 838 F.2d 1031 (9th Cir. 1988). Thus the court finds that the alleged violations are in areas that confer clearly established rights.

Most important for this motion is the Ninth Circuit's holding in *Gutierrez* that "qualified immunity is not a defense in cases involving intentional racial or other similar discrimination, including national origin." 838 F.2d at 1051. After *Harlow*, the Ninth Circuit recognized that limiting the qualified immunity inquiry to objective criteria could produce unjust results in cases where a necessary element of the underlying constitutional claim is subjective in nature (e.g. motive or intent). *See generally* SHELDON H. NAHMOND, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 § 8.07 (3d ed. 1991). In many cases the question of intent cannot be settled on summary judgment. The claims of race and sex discrimination in the present case present questions of intentional

discrimination and thus are not appropriate for summary judgment on the issue of qualified immunity.

On the other hand, plaintiff should not be allowed to survive summary judgment by merely alleging intentional discrimination. Therefore, the Ninth Circuit in *Gurierrez* also stated that, as a matter of pleading, "plaintiffs must state in their complaint nonconclusory allegations setting forth evidence of unlawful intent." 838 F.2d at 1052. Nunez has met this burden. She alleges that Davis sexually discriminated in giving raises, that he instructed her to give low evaluations to female employees, and that he taunted women about their abilities to find employment elsewhere if they lost their jobs with the city. Amended Complaint, ¶ 24(e), (f), (l). Plaintiff also has set forth evidence of racial discrimination. She claims Davis repeatedly made a racial joke in her presence and that he often referred to her and two other Hispanic employees as "the three banditos." Amended Complaint ¶ 35, ¶ 36. Thus, because plaintiff has alleged a constitutional violation requiring the court to determine Davis's mental state, and because she has sufficiently plead nonconclusory allegations setting forth unlawful intent, the motion for summary judgment is denied. *Gutierrez*, 838 F.2d at 1051-52.

B. First Amendment

Regarding the First Amendment issue, Davis cites *Gunaca v. State of Texas*, 65 F.3d 467 (5th Cir. 1995), arguing that retaliatory discharge motivated by the employee's political activities entitle a state official to

qualified immunity. In *Gunaca*, the plaintiff was an investigator for the district attorney. The newly elected district attorney chose not to reappoint plaintiff to his job. *Id.* at 469. The court found qualified immunity for the district attorney because the right asserted by plaintiff was not clearly established at the time it was violated. *Id.* at 475. The court noted that political loyalty may be demanded of public employees whose First Amendment interests are outweighed by a governmental interest in the employee's political loyalty. *Id.* at 474, citing *Branti v. Finkel*, 445 U.S. 507 (1980). However, despite announcing this standard, the court made no explicit finding on this issue, instead basing its opinion on the finding that the district attorney did not violate a clearly established right. *Id.* at 475. The court noted that neither the Fifth Circuit nor the Supreme Court had addressed the issue of political patronage in hiring or firing investigators in the district attorney's office.

Despite *Gunaca*, the case of *Chateaubriand v. Gaspard*, 97 F.3d 1218 (9th Cir. 1996) implies that the right to not be fired for political patronage reasons is more clearly established in the Ninth Circuit. The employee in *Chateaubriand* was a public information officer for the Washington State Senate Democratic Caucus. *Id.* at 1219. He resigned after being pressured to use his staff for illegal campaign purposes. *Id.* The court stated that a public employer may not discharge an employee on a basis that infringes on constitutionally protected freedom of speech. *Id.* at 1222 (quoting *Rankin v. McPherson*, 483 U.S. 378, 383 (1987). In formulating these concerns, the court stated that the employee must prove that the conduct was constitutionally protected, and that it was a

substantial or motivating factor in the termination. *Id.* at 1222 (citing *Board of County Comm'rs v. Umbehr,* 116 S.Ct. 2342, 2347 (1996)).

The court stated that to be protected the speech must address a matter of public concern. *Id.* (citing *Connick v. Myers,* 461 U.S. 138, 146 (1983)). The court then found that complaints regarding illegal campaign activity fall squarely within the category of speech addressing public concern. *Id.* at 1223. Similarly, in the present case, Nunez had a right to make employment decisions without regard to Davis's campaign.

The next question is whether the speech was a substantial or motivating factor in the employment decision. *Id.* This is a factual determination not suitable for decision on summary judgment. In a disputed case on summary judgment, the court must view the evidence in the light most favorable to the non-moving party. *Adickes v. S.H. Kress and Co.,* 398 U.S. 144, 157 (1970). Thus, the court assumes that the speech was a substantial factor in motivating the employment decision. However, the court notes that in this case the connection between plaintiff's First Amendment rights and the firing is somewhat tenuous because plaintiff herself was not speaking out but was fired for treating fairly those who, by their conduct, did speak out.

Finally, the court must still balance the interests of the plaintiff against those of the state in promoting the efficiency of the public services it performs through its employees. *Chateaubriand,* 97 F.3d at 1224, citing *Umbehr,* 116 S.Ct. at 2374-48. In *Burgess v. Pierce County,* 918 F.2d 104, 107 (9th Cir. 1990), the Ninth Circuit declined to rule

in favor of defendants where they argued the termination was for efficiency reasons but plaintiff "alleged and offered substantial proof" that he was fired in retaliation for speaking out. Because the motives for termination were a matter of factual dispute, the court declined to rule on the issue. *Id.* (citation omitted). Similarly, in the present case, there is a dispute as to the motives for termination. The court declines to accept defendant's invitation to require at this early stage that plaintiff prove that retaliation was the *only* reason she was fired. Therefore, because of the factual nature of the motivation and efficiency questions, and because the court finds that there is a clearly established right not to be terminated by a public employer for political patronage, the court denies defendant's motion for summary judgment on the First Amendment issue.

MOTION FOR DEFAULT

Plaintiff moves for entry of default (#32) because defendants failed to file an answer within 20 days of service of this court's ruling on the motion to dismiss. FED. R. CIV. P. 55 provides for default where a party has "failed to plead or otherwise defend" a suit. Defendants filed a Rule 12 motion to dismiss. The court finds this sufficient evidence of defendants' intent to defend this suit. Therefore, the motion for entry of default is denied.

Accordingly, **IT IS HEREBY ORDERED** that defendant's motion for summary judgment (#30) is **DENIED.**

IT IS FURTHER ORDERED that plaintiff's motion for default (#32) is **DENIED.**

DATED: This 27th day of January, 1997.

/s/ David W. Hagen
UNITED STATES
DISTRICT JUDGE